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No. 79-582

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF COLORADO, ET AL., PETITIONERS

v.

VETERANS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that the statutory liability of educational institutions for overpayments that the Veterans Administration makes to students is unconstitutional.

1. The Veterans Administration (VA) administers a statutory program of financial assistance to eligible veterans who are enrolled in a course of study approved by a state's "approving agency." See 38 U.S.C. 1771, 1772. Under the program, veterans

are paid directly by the VA as long as they are satisfactorily pursuing their studies. To ensure that only such students are paid, educational institutions must report to the Administrator of the Veterans Administration periodically on whether students are still satisfactorily enrolled, and the VA pays the schools a fee for this service. 38 U.S.C. 1784. If a school willfully or negligently fails to report to the Administrator the termination of a veteran's enrollment or other conditions leading to ineligibility for payment, and if the VA as a result continues to pay the student, the amount of the overpayment to the student may be recovered from the educational institution "in the same manner as any other debt due the United States." 38 U.S.C. 1785.[1]

States may participate in the VA's educational assistance program by designating an "approving agency" and by contracting with the VA to administer the program. The contract contains a provision requiring compliance with Chapter 36 of Title 38 of the United States Code (the chapter that contains 38 U.S.C. 1785) and VA regulations issued thereunder. The State of Colorado has designated the state board for community colleges and occupational education as the "state approving agency" under 38 U.S.C. 1771. Colo. Rev. Stat. § 23-60-303(2) (1973) (See Pet. App. 19). Colorado has also contracted with

[1] VA reimburses the school if the student subsequently returns the overpayment. 38 U.S.C. 1785.

the VA to administer the program (Supp. R. IV 22-41).[2]

Pursuant to Section 1785, the Veterans Administration notified certain schools in Colorado that they might be liable for overpayments due to their failure to keep the VA informed as to the status of named veteran students. Petitioners then brought this declaratory judgment action against the VA in the United States District Court for the District of Colorado, alleging that 38 U.S.C. 1785 is unconstitutional. Following a non-jury trial, the court rejected petitioners' claims and entered judgment for respondents. 430 F. Supp. 551 (1977). The court stated (*id.* at 558):

> Placing monetary liability for illegal payments on a party who holds the duty to monitor and report changes in student status—and thereby prevent overpayments—is rationally related to a legitimate government function. [Petitioners] assumed the obligation to monitor and report on student status when they participate in the VA educational benefits program. As a simple matter of a contractual duty flowing from the school to the state certifying agency to the VA, the schools can be held liable for overpayments. Under the terms of § 1785 [petitioners] will be held liable only when the overpayments are found to be the result of negligence or willfulness in reporting changes in status, or false certification of eligibility. There exists no constitutional infirmity in such a regulation.

[2] "Supp. R." refers to the supplemental record filed in the court of appeals.

> Congress clearly has the right to establish a procedure for disbursement of benefits to veterans and others through its enumerated power to raise and maintain an army and navy. The VA educational benefit program was thought necessary to encourage enlistments. Requiring those who voluntarily participate in the program to be responsible for the funds they cause to be disbursed is legitimate. Under the spending power itself, Congress has the authority to place limitations and liabilities on those who have a duty to prevent unauthorized payments and who, through negligence, allow illegal payments to be made.

The court of appeals affirmed (Pet. App. 1-13). It noted (*id.* at 5-6) that Colorado had adopted the Educational Assistance Program by statute and had contracted with the VA to implement the program, that "the duties of [petitioners] arose primarily from the contract entered into with the VA by Colorado" (*id.* at 6), and that the State's enabling statute was "a formal adoption of the Program with the statutory, contractual, and regulatory undertakings" (*id.* at 7).[3] It concluded (*ibid.*):

> The case is thus basically a matter of basic contract law, as the trial court indicated. When the issues are so examined, we find no substance to the [petitioners'] claim of interference with the educational process in Colorado, and no basis

[3] The Colorado statute designating the approving agency is captioned "[a]cceptance of congressional acts." Colo. Rev. Stat. § 23-60-303 (1973).

> for any claim of unconstitutionality. The trial court disposed of these contentions in its memorandum, and we agree with its analysis and conclusion on this issue.

2. The court of appeals correctly rejected petitioners' claim that 38 U.S.C. 1785 is unconstitutional. There is no conflict among the circuits on this question, and no need for further review by this Court.

Petitioners claim (Pet. 11-12) that the court of appeals' decision "binds non-recipient schools" in violation of the Constitution. But, as both lower courts found (Pet. App. 6; 430 F. Supp. at 558), the VA and the State of Colorado executed a contract providing for just such a result—that overpayments made to veterans as a result of the schools' willful or negligent reporting of the students' status would be a liability enforceable against the schools.[4] Whether Congress could have brought about such a result absent a contract between the parties is beside the point. The court below correctly concluded that the dispute was a matter of contract law, with no substantial constitutional overtones.

Thus, petitioners' claim that the decision below forces them to surrender constitutional rights and acquiesce in allegedly illegal regulations (Pet. 14) is frivolous. Any contract binds a party to do things that it is not otherwise required to do. Petitioners make no claim that the contract is invalid or that the VA is misconstruing it, and they point to no

[4] If the schools are ultimately found liable, the payments to the VA will come from state funds (R. 4).

"illegality" in the statute or regulations that is not answered by the fact that the State agreed, by signing the contract, to accept the obligations the statute imposes.

For this reason, petitioners fare no better with their claim (Pet. 12-15) that the decision below is in conflict with *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). If, as petitioners contend, there is here an "intrusion into state managerial and fiscal matters" (Pet. 13), it is an "intrusion" justified by a contract that the State of Colorado voluntarily accepted.

Whether, and to what exent, petitioners are actually liable for any overpayment remains to be seen.[5] This action was for declaratory relief only; if and when the Veterans Administration brings suit against petitioners or any other party for recoupment of amounts paid to ineligible veterans, that party will have the opportunity to raise whatever defense it may have to the claim itself. What is clear at this point, and what both courts below held, is that petitioners have no basis to undermine a valid contract by claiming, in effect, that the VA would have no right to collect overpayments except for the contract.[6]

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[5] The "1,400 claims" that petitioners cite (Pet. 19) have been reduced by at least one-third (430 F. Supp. at 555). The two cases cited by petitioners (Pet. 19) have since been dismissed by stipulation of the parties and we are aware of no other case that presents this question.

[6] For example, petitioners claim (Pet. 18) that the decision below "could not be reached where a state has not created or designated a state approving agency. Thus, the Tenth Circuit's opinion draws a distinction between schools in states with an approving agency and those with none, which is arbitrary and improper." Because Colorado has created a state approving agency (see page 2, *supra*), it makes no difference whether a different result would have obtained in some state without one; and the "distinction," far from being "arbitrary and improper," is quite obviously a substantial distinction based on whether a state has agreed to be liable for overpayments.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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